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No. 84-141

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOWARD SCOTT, ET AL., PETITIONERS

v.

SMALL BUSINESS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners seek review of the dismissal of their action brought under Rule 60(b)(6), Fed. R. Civ. P., to set aside a judgment awarding the government damages for default on three loans guaranteed by the Small Business Administration. (SBA).

1. Petitioners are two corporate officers of Lavender House, Inc. (a publicly held corporation), a spouse of one of the officers, and two other minority shareholders. Petitioners claim to represent themselves, other shareholders, and the company. In the first round of this litigation, petitioner Scott, president of Lavender House, filed an action against the SBA in the United States District Court for the Eastern District of Pennsylvania on behalf of himself, his wife, and the company, which was styled as a shareholders' derivative suit. That suit sought damages from the SBA for the agency's alleged unlawful conduct in connection with three

SBA-guaranteed loans made to the company. The SBA counterclaimed for damages resulting from petitioners' default on the loans.

The district court dismissed petitioners' claims on statute of limitations grounds. A trial was held on the government's counterclaim, and those petitioners who were plaintiffs in that action waived their right to appear. See App., *infra,* 3a-4a.[1] The court entered judgment in favor of the SBA in the amount of $416,322.79. That judgment was affirmed without opinion by the court of appeals (659 F.2d 1070 (1981)), and this Court denied certiorari (454 U.S. 851 (1981)).

2. Petitioners then filed the instant "Independent Action Pursuant to Rule 60(b)(6)," Fed. R. Civ. P., seeking to set aside the prior judgment. Petitioners contended that the judgment was erroneous and the product of judicial bias and prejudice. The district court dismissed the action. App., *infra,* 1a-4a. It found that petitioners' new complaint lacked the requisite basis for a Rule 60(b) motion, namely, a claim of fraud, mistake, or new evidence discovered since the time of trial or any other new circumstance. In particular, the court rejected petitioners' contention that the judgment should be set aside because they were not present at the trial of the counterclaim. The court found ample unrebutted evidence in the original record showing that petitioners waived their right to be present at trial. See App., *infra,* 3a. Additionally, the court found that petitioners' claim of judicial bias or prejudice amounted to nothing more than a challenge to the correctness of the legal rulings underlying the original judgment, because there was no other evidence of bias. *Id.* at 4a. Such a challenge, the court held, was barred by res judicata. *Ibid.*

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[1]The opinion of the district court was omitted from petitioners' appendix and is appended hereto.

The court of appeals affirmed without opinion (Pet. App. 6A).

3. Petitioners contend (Pet. 6-7) that they should be relieved from the prior judgment because they did not appear at trial. This contention is one that should have been raised in petitioners' first appeal, and there is no basis for reviving it in the guise of a Rule 60(b) motion. In any event, the claim is insubstantial for the reasons explained by the district court (App., *infra*, 3a). There is similarly no merit to petitioners' contention (Pet. 7-9) that the district court's entry of summary judgment violated Rule 23.1, Fed. R. Civ. P. Petitioners apparently confuse the entry of judgment by the court with a decision by the parties to settle or to dismiss the action voluntarily. Finally, those petitioners who were not parties to the original action contend in conclusory fashion (Pet. 9-10) that they or the company should not be bound by the judgment in that case. It is difficult to discern the basis for this contention. To the extent petitioners are claiming that the first judgment is void because of inadequate representation, that claim was correctly rejected by both courts below. To the extent they are claiming that the res judicata effect of the decision should be limited in a future action, that contention, which seems to be without basis, has no place in a Rule 60(b) proceeding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1984

DOJ-1984-10

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD SCOTT, In Derivative Action on behalf of the public company, Lavender House, Inc., his wife Shirley, and himself	:	CIVIL ACTION FILED APR 20 1983
v.	:	
SMALL BUSINESS ADMINISTRATION, an Independent Agency of the United States of America	:	NO. 83-1553

[Apr. 19, 1983]

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J.

Howard Scott brings a derivative action on behalf of Lavender House, Inc., his wife Shirley and himself against the Small Business Administration. Plaintiff describes this action as an "Independent Action Pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, to Set Aside this Court's Judgments in Case 78-62, Motion for a Three Judge Court, and Affidavit for the Step Aside of Bias and Prejudiced Judge."

The complaint makes clear that the only relief sought on behalf of the complainants for the alleged violation of diverse civil rights of black United States citizens is to set aside a prior grant of summary judgment in defendant's

favor in Civil Action No. 78-62 (E.D. Pa.), and a money judgment in defendant's favor on its counterclaim in the amount of $416,322.79 in the same action.

Plaintiffs appealed that decision first to the Third Circuit Court of Appeals which affirmed by judgment order, *Scott v. U.S. Department of Commerce,* 659 F.2d 1070 (3d Cir. 1981), and then to the United States Supreme Court which denied *certiori* [*sic*], *Scott v. Small Business Administration, cert. denied,* 454 U.S. 851, *rehearing denied,* 454 U.S. 1094 (1981).

Having exhausted all means of appellate review, plaintiffs filed this independent action alleging that in Civil Action No. 78-62: (a) they were denied their right to be present or have counsel present at trial; (b) the trial judge made erroneous rulings of law with regard to the securities, patent, antitrust laws and statute of limitations; and (c) the trial judge was biased and prejudiced.

Rule 60(b) provides that the court may relieve a party from a final judgment for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other justifying relief from the operation of the judgment.

Although parties generally invoke Rule 60(b) by post-trial motion in the underlying action, the rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment ...." Fed. R. Civ. P. 60(b). Nonetheless, consideration of such actions is

limited to cases of extraordinary circumstance, generally involving fraud or deception upon the court. *See, Ackerman v. United States,* 340 U.S. 193 (1950); *Klapprott v. United States,* 335 U.S. 601 (1949); 7 Moore's Federal Practice §§ 60.36-60.37. Moreover, when a case has been affirmed on appeal the district judge is not free to flout the decision of the appellate court but may reopen the judgment only if there are circumstances not previously known that compel such extraordinary relief. *See,* 11 C. Wright and A. Miller, Federal Practice and Procedure § 2873 p. 269 (1973). Plaintiffs make no claim that fraud, mistake, new evidence or any other new circumstances has been discovered since the time of trial. In the absence of such a claim, we lack the power to proceed and must abide by the *res judicata* effect of the appellate affirmance of the district court's decision.

Furthermore, the allegations set forth in plaintiffs' complaint are not appropriate to a Rule 60(b) claim. Plaintiffs argue that they were denied an opportunity to be present or represented at trial. This is contradicted by the record. On April 28, 1980, the first day of trial on defendant's counterclaim, the judge, after recognizing plaintiffs' absence, made a part of the record the special delivery notice informing plaintiffs of the date of trial. On the second day, April 29, 1980, the trial judge read into the record the following mailgram received by the court:

> Plaintiffs received notice dated 4/23/80 through the mails on 4/28/80 trial scheduled that same date on the pending counterclaim. Due to short notice and illness, plaintiff is unable to appear. However, plaintiff has no objection for Court to consider in plaintiff's absence all evidence he has now filed if trial date cannot be rescheduled. Respectfully submitted Howard Scott.

Having waived his rights, Mr. Scott cannot reassert them through this independent action under Rule 60(b).*

Finally, plaintiffs accuse the trial judge of "unprecedented bias and prejudice" but the only bias or prejudice claimed [is] in making the alleged erroneous rulings. It is axiomatic that a judge's rulings at trial are not grounds for recusal for bias or prejudice because they can be corrected by reversal on appeal. *Johnson v. Trueblood,* 629 F.2d 287 (3d Cir. 1980). The rulings alleged to be erroneous, and therefore biased and prejudiced, have been affirmed on appeal in Civil Action No. 78-62 and no reason has been alleged justifying relief from the operation of this final judgment.

Finding no basis to entertain a Rule 60(b) action, this matter is dismissed.

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* Plaintiffs were aware of the trial commencing April 28, 1980, but argue that they were not notified of the trial on May 5, 1980. But no hearing or trial relating to this matter took place on that day. Plaintiffs may be confused because the minutes of April 28, 1980 and April 29, 1980 were docketed on May 5, 1980.